

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Licensing Order
Issued to Randy J. Golombecki,
Individually and d/b/a Randy Golombecki
Construction

**ORDER GRANTING
MOTION IN LIMINE
AND
MOTION FOR SANCTIONS**

This matter came before Administrative Law Judge Jeanne M. Cochran on a Motion in Limine and Motion for Sanctions filed by the Department of Labor and Industry (Department). The Motion was filed and served on December 18, 2013. Pursuant to Minn. R. 1400.6600, Randy J. Golombecki (Respondent) was given ten business days from the date on which the Motion was received (December 18, 2013) to file a reply. The Respondent did not file a reply by the January 3, 2014 deadline. As a result, the matter was taken under advisement on that date.

Christopher M. Kaisershot, Assistant Attorney General, represents the Department. Thomas Pearson, Gammello, Qually, Peason & Mallek, represents the Respondent, Randy J. Golombecki, individually and d/b/a Randy Golombecki Construction.

Based on all of the files and proceedings herein, and for the reasons contained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

1. The Department's Motion in Limine is **GRANTED**. The Respondent will not be permitted to offer expert testimony at the evidentiary hearing scheduled to commence on January 29, 2014 in Brainerd, Minnesota.

2. The Department's Motion for Sanctions is **GRANTED**. The Department's Requests for Admissions served on September 6, 2013 are deemed admitted. In addition, the Respondent will not be permitted to call any witnesses or introduce any evidence at the evidentiary hearing that would have been responsive to the Department's Interrogatories and Request for Production of Documents served on September 6, 2013.

3. A status conference will be held on **Thursday, January 23, 2014 at 9:30 a.m. via telephone conference**. The parties shall call 1-888-742-5095 and dial

conference code 544-169-9282# at that time. At the status conference, Counsel for the Respondent shall confirm that he has provided a copy of this Order and the prior orders issued in this matter to his client, and shall be prepared to discuss whether his client plans to proceed with his appeal of the Licensing Order with Penalty dated April 11, 2013.

4. All pre-filing deadlines in the First Prehearing Order remain in effect.

Dated: January 8, 2014

s/Jeanne M. Cochran

JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

Factual Background

On June 24, 2013, the Department issued a Notice and Order for Prehearing Conference in the above-captioned matter. The Notice and Order for Prehearing Conference alleges that the Respondent failed to correct violations of the State Building Code in violation of Minn. Stat. §§ 326B.082 and 326B.084, and that the Respondent failed to comply with a request for information from the Commissioner of the Department within the time specified in violation of Minn. Stat. §§ 326B.082 and 326B.84.¹ The specific allegations are set forth in the Licensing Order with Penalty (Licensing Order) issued by the Department on April 11, 2013.²

On August 20, 2013, the Administrative Law Judge issued the First Prehearing Order following a prehearing conference with counsel for the parties. The First Prehearing Order established filing deadlines, set the hearing dates, and addressed other related matters.³

On September 6, 2013, the Department served Requests for Admissions, Interrogatories, and Requests for Production of Documents (collectively, Discovery Requests) on counsel for the Respondent.⁴ Under the applicable rules of discovery, the responses to the Requests for Admissions were due within 10 days, and the responses to the Interrogatories and Requests for Production of Documents were due within 30 days.⁵

¹ Notice and Order for Prehearing Conference at 3.

² Licensing Order with Penalty (attached to Notice and Order for Prehearing Conference).

³ First Prehearing Order (August 20, 2013).

⁴ Motion to Compel, Exhibit (Ex.) 1.

⁵ Minn. R. 1400.6800; Minn. R. 1400.6700, subp. 2.

On October 17, 2013, counsel for the Department faxed a letter to counsel for the Respondent because the Respondent had not provided any response to the Discovery Requests as of that date.⁶ Counsel for the Department requested that the Respondent “immediately provide responses to the Department’s discovery requests” and also stated that he was willing to discuss how to resolve any discovery disputes.⁷ As of October 28, 2013, counsel for the Respondent still had not provided any responses to the Department’s Discovery Requests. Nor had counsel for the Respondent communicated with counsel for the Department regarding the Discovery Requests.⁸

On October 30, 2013, the Department filed a Motion to Compel Discovery as a result of the Respondent’s failure to respond to the Department’s Discovery Requests. The Respondent did not file a reply to the Department’s Motion to Compel.

On November 26, 2013, the undersigned Administrative Law Judge issued an Order Granting Motion to Compel. The Order required the Respondent to respond to the Department’s September 6, 2013 Discovery Requests by December 10, 2013. The Respondent failed to provide discovery responses by December 10, 2013 and has not done so to date.

On December 18, 2013, the Department filed its Motion in Limine and Motion for Sanctions. As noted above, the Respondent did not file a response to the Motion in Limine or the Motion for Sanctions.

Motion in Limine

In its Motion in Limine, the Department requests that the Respondent be precluded from offering expert testimony because the Respondent failed to comply with the expert disclosure deadline set forth in the First Prehearing Order. The First Prehearing Order requires each party to identify any expert that it plans to call at the evidentiary hearing and provide a summary of the facts and opinions as to which the expert is expected to testify by December 2, 2013.⁹ The Department disclosed its expert in accordance with the First Prehearing Order, but, to date, the Respondent has not disclosed the name of any expert that it plans to call. Nor has it provided a summary of the expert’s testimony.¹⁰

The Department argues that the Respondent’s failure to comply with the expert disclosure deadline is grounds for excluding any expert testimony offered by the Respondent. The Department asserts that the Respondent’s failure to disclose an expert by the December deadline precludes the Department from having adequate time to determine whether any late-offered expert is qualified as an expert, or whether the expected testimony is admissible. The Department also claims that it is prejudiced in its

⁶ Motion to Compel, Ex. 2.

⁷ *Id.*, Ex. 2.

⁸ *Id.* at 1.

⁹ First Prehearing Order at 1 (August 20, 2013).

¹⁰ Motion in Limine at 1.

ability to adequately prepare its cross-examination of any expert that the Respondent may seek to call.¹¹

The Administrative Law Judge agrees that it would be highly prejudicial for the Respondent to be allowed to offer expert testimony at the January 29, 2013 hearing. The Respondent not only failed to comply with the December 2, 2013 expert disclosure deadline in the First Prehearing Order, but to date has not identified any expert. Nor has the Respondent provided any explanation as to why he has failed to do so. Therefore, the Department's Motion in Limine to preclude the Respondent from offering expert testimony at the evidentiary hearing in this matter is **GRANTED**.

Motion for Sanctions

The Department seeks sanctions pursuant to Minn. R. 1400.6800 and 1400.6700 because the Respondent has failed to comply with the Order Granting Motion to Compel dated November 26, 2013. The Respondent did not provide responses to the Department's Requests for Admissions, Interrogatories, and Request for Production of Documents by December 10, 2013 as required by the Order Granting Motion to Compel, and has not done so to date.

a. Requests for Admissions

With regard to the Requests for Admissions, Minn. R. 1400.6800 specifically provides "failure to make a written answer within ten days will result in the subject matter of the request being deemed admitted unless it can be shown that there was a justifiable excuse for failing to respond." Here, the Respondent has failed to provide written answers within ten days of service and has not provided any excuse for failing to respond. For these reasons, the Department's Motion for Sanctions pursuant to Minn. R. 1400.6800 is **GRANTED**. The Department's Requests for Admissions Numbers 1-7, served on September 6, 2013, are deemed admitted.

b. Interrogatories and Requests for Documents

The Department also seeks sanctions for the Respondent's failure to provide responses to its Interrogatories and Request for Documents as required by the November 26, 2013 Order Granting Motion to Compel. Where a party fails to reasonably comply with an existing discovery order, Minn. R. 1400.6700 authorizes the administrative law judge to make a further order prohibiting that party from introducing designated matters or making designated claims or defenses. Here, the Respondent has made no effort to comply with the Order Granting Motion to Compel and has provided no explanation for his failure to provide the required discovery responses. Given that the responses are now more than three months past due and the Respondent has given no explanation for his failure to provide the required responses, the Administrative Law Judge believes that the appropriate sanction is to preclude the Respondent from calling any witnesses or introducing any evidence at the hearing that

¹¹ *Id.* at 2.

would have been responsive to the Department's discovery requests. While this is a serious sanction, it is appropriate given the Respondent's complete disregard for the rules governing discovery and his violation of the November 26, 2013 Order Granting Motion to Compel, as well as his failure to provide any explanation for his inaction. For these reasons, the Department's Motion for Sanctions pursuant to Minn. R. 1400.6700 is **GRANTED**.

J. M. C.